Supreme Court, U.S.
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No. 98-1128

In The

Supreme Court of the United States

October Term, 1998

VERMILION CORPORATION,

Petitioner,

v.

SAM GREEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit in its decision to allow Sam Green to pursue his general maritime negligence and unseaworthiness claim against Vermilion, his employer, despite the exclusivity provision of the Louisiana Workers' Compensation Act err, and, in doing so, create a split in the circuits of sufficient importance to warrant this court's review on a writ of certiorari?

PARTIES AND LIST PURSUANT TO RULE 29.1

The parties as stated in Pet. Cert. ii.

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BRIEF IN OPPOSITION

Respondent respectfully prays that this petition for a writ of certiorari to the Supreme Court of the United States be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 144 F.3d 332 (5th Cir. 1998) as is reproduced at Pet. App. A.

JURISDICTION

As will be shown, there is no jurisdictional basis for this Court to entertain the Petition for Writ of Certiorari. The Fifth Circuit's decision is not in conflict with the decision of another United States court of appeals on the same important matter.

STATEMENT OF THE CASE

Respondent, Sam Green was injured while mooring THE M/V GADWALL on navigable waters. Green claimed benefits under the Longshore and Harbor Worker's Compensation Act, in addition to asserting a cause of action for unseaworthiness and negligence under the General Maritime Law.

At the district court level, Green's claims under LHWCA and those under the general maritime law of

negligence and unseaworthiness were dismissed. On appeal, the Fifth Circuit Court of Appeals found that Green fell into the category of employees for which congress drafted the "club/camp" exception, and affirmed the district court's judgment denying LHWCA coverage to Green. However, the Fifth Circuit reversed the judgment of the district court dismissing Green's general maritime negligence and unseaworthiness claims. First, the Fifth Circuit determined that a remedy was available under the general maritime law of unseaworthiness since the LHWCA did not apply to Green. Secondly, the Fifth Circuit determined that Green could assert his general maritime negligence claim against his employer, despite the exclusivity provision of the Louisiana Workers' Compensation Act, relying on Supreme Court precedent.

Petitioner seeks this writ which essentially calls upon this Court to grant them total tort immunity against both the unseaworthiness claim and the negligence claim under the general maritime law despite the fact that there are no overriding state interests in the application of the workers' compensation law which would outweigh the federal interests regarding the uniformity in the application of the general maritime law.

Petitioner takes the following positions:

A. The decision of the Fifth Circuit creates a split in the circuits.

B. The decision of the Fifth Circuit creates a split in the circuits on an issue that is "important".

C. The decision of the Fifth Circuit is wrong.

REASONS FOR DENYING THE WRIT

NO SPLIT IN THE CIRCUITS

1. The Unseaworthiness Claim

Both the Eleventh Circuit[1] and the Fifth Circuit do in fact recognize that an unseaworthiness claim is available against the employer despite the availability of relief under the state's workers' compensation laws. Both Circuits recognize that unseaworthiness is a "right peculiar to the law of admiralty"[2] and the state worker's compensation statute can be disregarded in favor of permitting an action in general maritime law for unseaworthiness. In this case, where the LHWCA does not apply, the 1972 Amendments to the Act which abolished a longshoreman's unseaworthiness claim does not affect Green's claim since he falls outside the scope of the LHWCA. Consequently there is not a split in the circuits regarding this issue.

2. General Maritime Negligence

While it is true that the Eleventh Circuit in *Brockington* and the Fifth Circuit in *Green* arrived at contrary results, it is not entirely accurate to conclude that the circuits are split on the issue. Both Circuits weighed the federal interests in promoting uniformity in the application of federal maritime law against the state's interests in overriding the negligence claims of an employee against his employer via its workers' compensation statute.

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[1] *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990).

[2] *Id.* at 1531, citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) and *Brown v. ITT Rayonier Inc.*, 497 F.2d 234 (5th Cir. 1974).

The general maritime law is drawn from both federal and state sources and is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.[3] Within admiralty jurisdiction, the general maritime law applies unless preempted by federal legislation.[4] Under the general maritime law, a state law which changes, modifies, or affects maritime law may be given effect **unless**

> **it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.**[5]

The Fifth Circuit in *Green* did recognize the state's interest in overriding negligence claims of an employee, citing *Ellis v. Normal Life*, 638 So.2d 422 (La.App. 5th Cir. 1994). However, when the Court compared the importance of uniformity of admiralty law with the state's interests, the Court ultimately found that the Louisiana Worker's Compensation Act interfered with the proper harmony and uniformity of the general maritime law. On the other hand, the Eleventh Circuit in *Brockington* found the uniformity of the general maritime law and the usual

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[3] *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865, 106 S.Ct. 2295, 2299, 90 L.Ed.2d 865 (1986).

[4] *East River Steamship*, 475 U.S. at 864, 106 S.Ct. at 2298; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61, 40 S.Ct. 438, 440, 64 L.Ed. 834 (1920); *Chelentis v. Luckenback Steamship Co.*, 247 U.S. 372, 381, 38 S.Ct. 501, 503, 62 L.Ed. 1086 (1917).

[5] *Chelentis*, 247 U.S. at 381, 38 S.Ct. at 503, *emphasis ours.*

supremacy of the federal maritime law less significant in light of the comparative interests of the state.

The divergence results simply from the fact that when weighing the importance of uniformity of admiralty and the state's interests in the application of its worker's compensation laws, each court had certain details before it which entered into the court's assessment, thereby producing a different result.

The Eleventh Circuit in the *Brockington* case barred a plaintiff from asserting a negligence claim under the general maritime law where an exclusivity provision of a state workers' compensation scheme applied. Brockington was a land-based electrician who was injured as a result of a boating collision while being transported by boat to his job site. He brought a negligence claim only (no claim was made for unseaworthiness of the vessel) against his employer invoking the admiralty jurisdiction of the federal courts under general maritime law. The employer moved for summary judgment, arguing that the claim was barred by the provisions of the Georgia Workers' Compensation Act. He also stated a cause of action under the LHWCA. However, the court found that he was not a maritime employee as defined by the Act.

Recognizing that under certain circumstances state law may appropriately be applied by federal courts sitting in admiralty, the Eleventh Circuit then evaluated the

propriety of applying the Georgia law in these circumstances. Using the analysis of balancing the relevant state and federal interests, the Eleventh Circuit found the "interest in applying the general maritime law to the present action is not substantial." *Brockington*, 903 F.2d at 1532.

Turning to the state interest involved, the Eleventh Circuit found that Georgia's interest in applying state law is relatively high. Brockington was a land-based construction worker, the work to be performed was totally land-based construction. Brockington was injured on a ferry boat which was transporting him to his job site on a nearby island. Thus, the nexus to maritime activity in the *Brockington* case was very slight since the actual work performed by Brockington was completely non-maritime in nature. Brockington's only connection with the water was the fact that he happened to be traveling over it incidental to land-based employment. Furthermore, the provisions of Brockington's employment contract incorporated Georgia worker's compensation law. Furthermore, it does not appear from the decision that the contract had any relation to navigation.

On the other hand, in the case before this Court, there is a stronger nexus to maritime activity implicating serious concerns regarding uniformity in the application of general maritime law. Green was injured while mooring a vessel. Mooring vessels were part of Green's duties with Vermilion. Unloading and loading the boat was also a part of Green's duties, since all supplies, etc. had to be brought to the camp by boat. There is no employment contract between Green and Vermilion providing any expectation that the Louisiana Worker's Compensation

laws would apply. Consequently, the federal maritime interests were correctly assessed and accorded due weight.

In *Brockington*, the employment contract provision stipulating to the applicability of the state worker's compensation laws tipped the balance against application of the general maritime law. *Brockington* cited the U.S. Supreme Court case, *P.J. Carlin Const. Co. v. Heaney*, 299 U.S. 41, 57 S.Ct. 75, 81 L.Ed. 27 (1936) in support of its position.[6] That case involved a construction worker who was seriously injured when a violent explosion wrecked the ferry upon which he was traveling to an island job site. The Court ruled that the employment contract providing for coverage under the New York worker's compensation laws, must be given effect because the parties and the accident were local, the contract had no direct relation to navigation, and to enforce it against the parties would not materially interfere with the uniformity of any maritime rule. **These significant concerns are *not* present in the case before this Court.**

In the end, then, there is no genuine conflict among the circuits. *Brockington* should be limited to the facts that were present in the case. The Eleventh Circuit simply attributed more weight to the state interests: a land-based

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[6] "Apparently the court in *Brockington* only unearthed the line of Supreme Court cases giving preclusive effect to state workers' compensation statutes since it failed to cite any of the cases recognizing the superiority of general maritime tort claims over state remedies. *See Brockington*, 903 F.2d at 1532." *Green*, 144 F.3d at 342, fn.3.

worker, coincidentally on a ferry, under a contract for employment pursuant to state law.

NO IMPORTANT ISSUE

Petitioner claims this "split" would perpetuate different remedies for similarly situated persons. This argument fails to recognize the important distinctions found in the *Brockington* case as analyzed above. While, at first glance, the circuits appear split on the issue, in reality, the circuits did consider the competing interests. The Eleventh Circuit gave more weight to the state's interest based on certain factors; *Green* gave more weight to the federal interests due to the lack of factors lending to the state's interest which could override the application of the federal law. Simply put, there were no overriding state law components which would make the *Green* case one where state interests in the application of its law outweighed federal interests.

Petitioner argues that the *Green* decision would affect the workers employed in the casino gambling industry on dockside/floating casinos. Had Petitioner done the research, it would have discovered that the Louisiana courts and the Fifth Circuit Court of Appeals have already determined that the floating casinos are work platforms, and thus, not "vessels"[7] for purposes of the

[7] *Chase v. Louisiana Riverboat Gaming Partnership*, La. App. 2 Cir. 2/25/98 (La.App. 2 Cir. 1998); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995); *McAdow v. Promus Companies, Inc.*, 926 F.Supp. 93 (W.D. La. 1996); *King v.*

Jones Act and general maritime law. The courts considered, among other things, the activity associated with the alleged injury, *dockside gambling*, and held that there is not the sufficient nexus to traditional maritime activity to confer admiralty jurisdiction on the court.[8]

The definition of "vessel" is relevant since it can determine whether a case gives rise to admiralty jurisdiction, because tortious acts occurring aboard a vessel are presumed to fulfill the maritime nexus requirement for maritime tort jurisdiction.[9] The Admiralty Extension Act also confers federal jurisdiction to hear cases arising out of damages or injuries "caused by a vessel on navigable water."[10] Further, the applicability of various statutes, including the LHWCA depends on whether the structure is a vessel. In addition, general maritime law claims, such as unseaworthiness claims and salvage claims, require

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Grand Casinos of Mississippi, Inc. – Gulfport, 697 So.2d 439 (Miss. 1997); *In re Treasure Bay Corp.*, 205 B.R. 490 (Bankr. S.D. Miss. 1997). *Pavone* was a consolidated action which involved a bartender and waitress on a floating dockside casino who filed their individual actions alleging they were injured on a Jones Act vessel.

[8] *Preston O. King v. The President Riverboat Casino-Mississippi, Inc.*, 894 F.Supp. 1008 (S.D. Miss. 1995).

[9] *Executive Jet Aviation, Inc. v. Cleveland*, 93 S.Ct. 493, 409 U.S. 429, 34 L.Ed.2d 454 (1972).

[10] The Admiralty Extension Act, 46 U.S.C. § 740 (1988), provides, in part, that "[t]he admiralty and maritime jurisdiction . . . shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

that the structure be classified as a vessel to bring those claims.[11]

Courts have also held that even if these casinos were moving over navigable waters, they would be serving a purpose merely incidental to its primary function as a gambling facility.[12] Therefore, a casino worker injured on a dockside floating casino is precluded from asserting claims under the general maritime law. Consequently, the *Green* decision has no impact on the casino industry in the way suggested by Petitioner. Green was injured while mooring a **vessel**. . . . the action fell under admiralty jurisdiction and general maritime law applied.

THE RULING BELOW IS NOT WRONG

1. Seeking to Divine Congressional Intent

Petitioner suggests that the ruling is wrong because it was Congress who dictated that Green could not sue his employer in tort. According to the argument, Congress in promulgating 33 U.S.C. § 902(3) expressly excluded (A)-(F) workers only if they were covered under a state workers' compensation act. Furthermore, according to the argument, the Fifth Circuit ignored the clause in order to

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[11] See e.g., *Waldron v. Moore-McCormack Lines*, 87 S.Ct. 1410, 386 U.S. 724, 727, 18 L.Ed.2d 482 (1967) and *Cope v. Vallette Dry-Dock Co.*, 7 S.Ct. 336, 119 U.S. 625, 30 L.Ed. 501 (1887).

[12] *Preston O. King v. The President Riverboat Casino-Mississippi, Inc.*, 894 F.Supp. 1008, 1012 (S.D. Miss. 1995); *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F.Supp. 1260, 1263-68 (S.D. Miss. 1994).

fashion a new rule and to provide a new remedy which Congress has decided not to accept and considered itself to be unfettered by congressional intent.

Petitioner claims that since Congress added the condition that the employee be covered under a state compensation scheme then that meant Congress intended that the employee has no remedy in tort against its employer. Petitioner provides no support for what it thinks is the intent of Congress, no committee reports, no Statement of Congressional Intent, no part of the legislative record whatsoever. Petitioner's fundamental error is in suggesting that conformity with the provision forecloses the injured maritime worker, in spite of an existing state worker's compensation scheme, the right to his general maritime claims. As the jurisprudence shows, the existence of a state workers' compensation scheme does not automatically preclude a maritime worker from asserting his maritime claims. If Congress had wanted to foreclose a general maritime cause of action for unseaworthiness or negligence, it knew how to say so. But it did not and there is nothing at all in that section to support Petitioner's conclusion.

CONCLUSION

The Petitioner misapprehends the issue and seeks from this Court an ironclad rule that state worker's compensation statutes override federal maritime law. However, the considerations taken by both circuits do not justify such a rule. Such a rule would not serve the

purpose of the federal maritime law or federal supremacy. The considerations taken by both circuits cannot be ignored and the relevant facts are different so that the circuits responded to them in a different fashion. There are no serious and farreaching consequences of the *Green* decision.

Likewise, Petitioner fails to challenge the Fifth Circuit's analysis of the federal interests and state's interests. Nor is there any suggestion that the method employed in *Green* was novel. The only challenge is made to the holding and because the two circuits reached different results, Petitioner presupposes a conflict in the circuits.

Supreme Court, rule 10 provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion and that petition for a writ of certiorari will be granted only for compelling reasons. Rule 10 also states that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Nothing in the Petition provides a compelling reason for this Honorable Court to grant the writ of certiorari.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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